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Issue ID: 0002 5114 03

BOARD OF REVIEW DECISION

0002 5114 03 (Feb. 25, 2014) - Police officer was disqualified under G.L. c. 151A, § 25(e)(2), because he violated his chief's order not to take any action that would tend to discourage, persuade, or retaliate against a particular witness with respect to that witness's truthful cooperation in the claimant's pending disciplinary proceedings. The fact that the witness was the claimant's best friend and that the claimant was understandably feeling anxiety did not mitigate the wilfulness of sharing detailed information about the investigation.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on August 6, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 19, 2012. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 12, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner in order to render findings from the record pertaining to the employer's accusation of filing false reports. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, by discussing his pending disciplinary action with a close friend who was also a principal witness in the disciplinary matter, after having been ordered not to do so, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The employer employed the claimant from July 16, 2001 until August 6, 2012, when he was discharged from his job.

2. The claimant's last day of work was June 7, 2012.

3. From June 8, 2012 until August 6, 2012, the claimant was on paid administrative leave.

4. The claimant was employed full-time as a police officer. The claimant reported to the Chief of Police.

5. The claimant was discharged from his job for filing false reports while conducting traffic enforcement stops and for discussing a pending investigation of the claimant with a police officer directly involved in the reason for the investigation.

6. By letter dated June 7, 2012, the Chief of Police notified the claimant that the department was investigating the claimant's documentation of traffic enforcement activity (reports made on May 23, 2012 and May 29, 2012).

7. The June 7 letter stated in part, "You are not to discuss this matter with anyone except me and if you choose your legal representatives".

8. The June 7 letter also stated, "Your failure to abide by the terms of your administrative leave and/or obey any of the directives above will constitute grounds for discipline, up to and including dismissal. This is separate and apart from any discipline that arises from substantiation of any charges that result from the investigation".

9. The employer included the above-referenced language in the June 7 letter because it did not want to compromise the ongoing investigation with respect to the claimant.

10. The claimant understood that the employer expected him to refrain from discussing the investigation with anyone except a legal representative.

11. The employer was awarded a "Click-It or Ticket" Grant. The Grant was to fund overtime shifts "to conduct high-visibility traffic enforcement during mobilization periods that can be supported by written or electronic records maintained at the police department". The Grant was to fund overtime shifts to accomplish the above-stated goal between May 14, 2012 and June 3, 2012.

12. The Grant called for officers who stopped cars to make sure drivers were wearing seat belts.

13. The Announcement of the CIOT grant included the following language: "Departments are required to conduct a minimum of three documented stops per hour…Documented stops are defined as any grant-funded patrol officer contact with motorists during the high-visibility traffic enforcement mobilizations periods that can be supported by written or electronic records maintained at the police department".

14. The employer did not convey to officers if the Grant defined a stop.

15. The employer does not have any policy which defines a stop.

16. Among other things, the Grant required officers to complete three stops per hour during a four hour block of time and to document the stops.

17. The claimant has a best friend (the "Friend"), who has been like a brother to the claimant for at least ten years. As of May 2012, the Friend usually came to the claimant's home on a daily basis.

18. In May 2012, the Friend was a special police officer ["Special Police Officer A"] in the employer's Police Department and a Commissioner on the employer's Board of Park Commissioners.

19. Sometime in June 2012, the employer gave the Friend verbal directions not to speak to the claimant about the pending investigation regarding the claimant and the claimant's "stops" of him.

20. In May 2012, the claimant had another friend who worked for the employer as Park Superintendent ("the Superintendent"). As of May 2012, the claimant had been friends with that friend for about fifteen years.

21. On August 6, 2010, the claimant signed a Settlement Agreement/Last Chance Agreement. The Agreement included the following language:

    "This is [Claimant's] last chance to refrain from any other conduct warranting a suspension of any length without pay. If the Police Chief and/or the Board of Selectman determine that [Claimant] has engaged in conduct warranting a suspension without pay of any length, including for a failure to comply with any term(s) of this Agreement, the [Employer] will have just cause to discharge [Claimant]".

22. The employer's Town of Selectman held a hearing (during which the claimant testified under oath) and was represented by counsel.

23. After the hearing, the Town of Selectman issued a decision concluding that the claimant falsely reported stops with respect to the Friend and the Superintendent, that the claimant disobeyed the Chief of Police's Order not to

discuss with [sic] the investigation and that the claimant's conduct violated employer regulations that an officer be truthful at all times and obey the order of a superior officer.

24. The employer has a Policy Manual for the Police Department of the employer.

25. The Manual includes a section titled, "GENERAL CONDUCT ON DUTY". That section includes the following language: "Truthfulness-An officer shall truthfully state the facts in all reports as well as when he appears before any judicial, departmental or other official investigation, hearing, trial or proceeding".

26. Within a few days after above-referenced June 7 letter was issued to the claimant, the claimant was at home with his three children and the claimant's wife was at work. The claimant's dog was dying at the claimant's home. The claimant contacted the Friend. The claimant contacted the Friend because he needed someone to talk to and the Friend is a life-long friend of his and like a brother to the claimant. The Friend came to the claimant's home and among other things, they discussed the Friend being interviewed by a Lieutenant and Sargent employed by the employer.

27. The claimant did not take any action, directly or indirectly, that would tend to discourage, persuade, or retaliate against [Special Officer A] or [Special Officer A's] cooperation in the matter underlying the claimant's paid administrative leave.

28. Another police officer in the employer's department submitted a CIOT grant activity report which contained an entry that did not constitute a valid stop under the grant. The officer recorded a stop where the officer pulled up next to a vehicle, spoke to the driver through the window and visually saw the driver and children in the vehicle wearing seat belts. The officer did not use the "blue lights" on his vehicle. The other police officer was disciplined. The other officer was not on a last chance agreement (as the claimant was) and for this reason, received lesser discipline than the claimant.

29. The claimant was assigned to overtime under the Grant on May 23 and May 29, 2012.

30. The employer asserted that the following claimant entries in his CIOT grant activity reports were false: a stop on May 23 at 1 p.m., a stop on May 29 at 1 p.m. and a stop on May 29 at 10:38 a.m.

31. At the time the claimant submitted his May 23 and May 29, 2012 CIOT grant activity reports, the claimant believed the above-referenced stops were valid stops under the Grant. The claimant's testimony was credible considering that the claimant used the same standard he had used throughout his employment

for recording stops and had never received any feedback from the employer that he had not been properly documenting stops.

32. The claimant recorded a stop of the Friend on May 23 at 1 pm. The vehicle was parked in a parking lot where the Friend worked. The Friend was in the driver's seat. The claimant gave the Friend a verbal warning by informing the Friend of this.

33. The claimant recorded a stop of the Friend on May 29 at 1 pm. The Friend was driving on Plymouth Street. The Friend was in the driver's seat. The claimant gave the Friend a verbal warning for speeding at 10:25 a.m. that day.

34. The claimant recorded a stop of the Superintendent on May 29 at 10:38 am. The vehicle was parked in a parking lot. The Superintendent was outside the vehicle. The claimant told the Superintendent he was giving him a verbal warning for having a bad shock.

35. None of the entries on the claimant's CIOT grant activity reports for May 23, 2012 or May 29, 2012 pertaining to reported stops of [Special Officer A] or [Park Superintendent] violated an employer policy, rule or expectation.

36. No other police officer in the employer's department was disciplined for submitting false entries under the CIOT grant.

Ruling of the Board

In accordance with our statutory obligation, we review the consolidated findings of fact made by the review examiner to determine: (1) whether these consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject consolidated finding # 27, which is a mixed question of fact and law, as it requires an interpretation of language in a directive (a legal issue) as well as a factual determination about the claimant's conduct.[1] As discussed at length below, we conclude that this portion of the Chief's directive, as properly interpreted, prohibited the claimant's conduct. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

Whereas the review examiner concluded that the claimant violated the employer's order not to discuss the investigation with anyone besides the Chief or a legal representative, we disqualify the claimant from receiving benefits on the significantly narrower ground that the claimant violated the employer's specific order not to speak with a particular principal witness about the detailed contents of his testimony at a point in time prior to the employer having concluded its investigation, hearing, and decision-making process regarding the claimant's employment. As narrowly applied here, that order was reasonable.

[1] When a case is pending before the Board of Review, the Board has the authority to decide questions of application of law to fact. Division of Employment Security v. Fingerman, 378 Mass. 461, 463-464 (1979).

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

The review examiner found that the employer discharged the claimant for two reasons: filing false reports while conducting traffic enforcement stops and discussing the pending disciplinary investigation with a fellow police officer who was directly involved in the incidents giving rise to the investigation. The employer bears the burden to prove that the claimant's conduct in these respects was deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Director of Division of Employment Security, 396 Mass. 226, 231 (1985). In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Director of Division of Employment Security, 393 Mass. 271, 275 (1984).

As to the first allegation, the review examiner found that the claimant did not engage in misconduct. The claimant was accused of submitting three false entries under a Click It or Ticket Grant ("Grant") report. Consolidated finding # 35 provides that the review examiner found that none of the entries violated an employer policy, rule, or expectation. She found that the employer did not have a policy that defined a stop and had not conveyed to its officers whether the Grant had its own definition of a stop. Thus, she found credible the claimant's belief that he was doing nothing wrong when he made the challenged entries because he used the same criteria as he always had for recording stops, for which he had never been reprimanded.

Credibility assessments are within the scope of the fact-finder's role; and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker did not understand the employer's expectation. Garfield v. Director of Division of Employment Security, 377 Mass. 94, 97 (1979). Since the employer failed to provide clear instructions, the review examiner reasonably credited the claimant's assertion that he did not believe his reported stops were misconduct.

In light of the finding that the claimant did not believe the entries were false, the employer has failed to prove the requisite state of mind to disqualify the claimant from receiving benefits, under G.L. c. 151A, § 25(e)(2).

As to the employer's second asserted grounds for terminating the claimant, the review examiner concluded that the claimant had violated the employer's express expectation, set forth in a June 7, 2012 letter from the Chief of Police to the claimant (exhibit # 16) (hereafter "the Chief's Order"), that he refrain from discussing the investigation with anyone except the Chief of Police

or the claimant's legal representative.[2] In the examiner's view, this constituted deliberate misconduct in wilful disregard of the employer's interests. In his appeal, the claimant argues that the review examiner's conclusion was based upon an error of law. The claimant contends that this portion of the Chief's Order was unreasonably overbroad as its reach would extend to lawful, concerted activities that are protected under the public sector collective bargaining law, G.L. c. 150E, § 2. We refrain from deciding whether this portion of the Chief's Order was unlawfully overbroad, under G.L. c. 150E, because we conclude that the claimant's discussion with the employer's Special Officer who was also the claimant's friend (hereafter "Special Officer A") violated another directive in the Chief's Order. We conclude that this other directive, as applied here, was a lawful, narrowly drawn, and reasonable expectation.

The Chief's Order advised the claimant that he was being placed on paid administrative leave while the employer investigated the allegations of false Grant entries. The investigation culminated in a hearing before the employer's Board of Selectmen, at which both the claimant and Special Officer A testified. *See* exhibit # 36. In addition to directing the claimant to turn in his badge and weapon and not to discuss the matter with anyone besides the Chief and a legal representative (set forth above), the Chief's Order stated:

> You are not to take any action, directly or indirectly, that would tend to discourage, persuade, or retaliate against a witness with respect to that witness' truthful cooperation in this matter, including but not limited to [Special Officer A] . . . .

The claimant's appeal points out that this portion of the Chief's Order nearly mirrors provisions under the witness intimidation statute, G.L. c. 268, § 13B. He does not argue that the provision was unreasonable, nor has he cited any authority that such a rule would be unlawfully overbroad, under G. L. c. 150E. Rather, the claimant contends that he did not violate this directive, in that he did not actually compromise the investigation. This portion of the Chief's Order was a reasonable expectation, designed to protect the integrity of the employer's disciplinary process. The employer had to determine whether the claimant had made two false Grant entries, a factual issue that depended in large part upon the truthful cooperation of Special Officer A and the absence of any potential collusion between Special Officer A and the claimant.

The review examiner found that the claimant invited Special Officer A over to his home within a few days of receiving the Chief's Order and discussed in some detail Special Officer A's interviews with the employer's representatives. The claimant testified that he was upset and needed someone to talk to. He told Special Officer A that the employer had put him on administrative leave and that the claimant thought that the employer was going to try to fire him.[3]

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[2] Exhibit # 16 is the Chief's June 7, 2012 order. While not explicitly incorporated into the review examiner's findings, its contents are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[3] The claimant offered undisputed testimony about his conversation with Special Officer A shortly after receiving the Chief's Order. Id.

In his appeal, the claimant argues that his conversation with Special Officer A was harmless, because the investigation was already completed. We do not agree. The employer's disciplinary process was still on-going. Special Officer A was a percipient witness who had yet to testify before the Board of Selectmen at the claimant's disciplinary hearing.[4] Under the circumstances, it was exactly the type of discussion that could elicit sympathy and could have discouraged Special Officer A from providing his full cooperation at a proceeding against his close friend. It also could have led either or both witnesses (Special Officer A and the claimant) to modify or coordinate their versions of events — perhaps in subtle or even unintentional ways.

The relevant portion of the Chief's Order reasonably prohibited conduct that would "tend" to interfere with the ongoing investigation, not just conduct that actually did result in demonstrable interference. This narrowly drawn directive was lawful and appropriate as applied to the conversation between Special Officer A and the claimant in the circumstances of this case. The claimant was clearly aware that he had been directed not to discuss the investigation with Special Officer A and intentionally chose to do so anyway. His understandable anxiety about his job and his domestic circumstances, including his dog's terminal illness, might have mitigated the willfulness of a brief or incidental allusion to the ongoing investigation, but not the significantly more detailed conversation that occurred on the subject.

We, therefore, conclude as a matter of law that the claimant's discussion of the pending disciplinary action against him with Special Officer A shortly after Chief's June 7, 2012, order not to do so was deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending August 18, 2012, and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

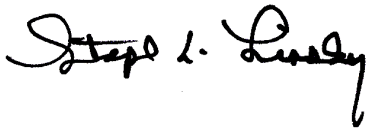
Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

[4] Exhibit # 13 is a memo to file from the Police Chief, dated July 13, 2012, documenting Special Officer A's statement that he and the claimant had talked about Special Officer A's interviews with the lieutenant and sergeant, and the stops *after* June 7th and *before* the hearing with the Board. Id.

*** CONCURRENCE ***

I join with the majority. However, I would note that while deference must, as the majority correctly points out, be given to credibility determinations rendered by the finder of fact, such determinations must also reasonably comport with the remainder of the record. Nowhere in the record does the claimant purport to misunderstand the purposes of his assignment relative to a program established by a special grant with the specific purpose of encouraging seat belt use. Accordingly, it is hard to fathom how the claimant would understand the purposes of this program would be advanced by attributing the issuance of warnings to friends for wholly unrelated infractions. Absent a showing of impaired acuity or performance, the record otherwise evidences misconduct that seems clearly deliberate in nature. Fortunately, we need not rely on this particular conduct to reach the appropriate result.



BOSTON, MASSACHUSETTS
DATE OF DECISION – February 25, 2014

Stephen M. Linsky, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh